

KENTUCKY PERSONNEL BOARD
MINUTES OF NOVEMBER 14, 2011

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chairman Doug Sapp on November 14, 2011, at approximately 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky.

Board Personnel Present:

Wayne "Doug" Sapp, Chairman
Larry B. Gillis, Vice Chairman
David B. Stevens, Member
David F. Hutcheson, Jr., Member
Susan Gardner, Member
Tommy W. Chandler, Member
Donald W. "Don" Blevins, Member
Mark A. Sipek, Executive Director and Secretary
Boyce A. Crocker, General Counsel
Linda R. Morris, Administrative Section Supervisor
Cynthia Perkins, Administrative Specialist

2. **READING OF THE MINUTES OF REGULAR MEETING HELD OCTOBER 7, 2011**

The minutes of the last Board meeting had been previously circulated among the members. Chairman Sapp asked for additions or corrections. Mr. Blevins moved to approve the minutes, as submitted. Ms. Gardner seconded, and the motion carried 7-0. The Board members signed the minutes.

3. **EXECUTIVE DIRECTOR'S REPORT**

Mr. Sipek advised that he attended the EEO Conference and was part of a presentation on alternative dispute resolutions for the Kentucky Employees Mediation Program (KEMP). Mr. Sipek stated that the EEO Conference was a successful event.

A. **Withdrawal of Proposed Amendment to 101 KAR 1:365.**
[Appeal and Hearing Procedures]

Mr. Sipek stated that due to receiving verbal comments regarding the language concerning the limited use of state resources, this regulation was withdrawn. The staff is working with other agencies to improve the language and to make clear to the employees how state resources may be utilized.

A suggestion was also received to extend the time to request oral argument. The regulation specifies a specific time, but the statute does not. The Board is considering extending exceptions to fifteen (15) days and a response to exceptions to fifteen (15) days and requests for oral argument within thirty (30) days. Shorter deadlines move the cases along faster; however, it is best for the parties to provide as much information as possible. Once the details are worked out, the proposed amendment will be brought before the Board within a month or two.

The Board members agreed to postpone discussion of the following matters until the end of the meeting during open session:

- B. 2012-2014 Budget Request Proposal
- C. Annual Report for 2011

At the conclusion of Mr. Sipek's report, Chairman Sapp called for the Personnel Cabinet's report.

4. **PERSONNEL CABINET'S REPORT**

The Hon. Dinah Bevington came forward to present the Personnel Cabinet's report. Ms. Bevington passed out copies of forms, incorporated by reference in the amended regulations, to the Board members for their review.

Amendments to Regulations:

- A. 101 KAR 2:102, Classified Leave Administrative Regulations
- B. 101 KAR 2:140, Workers' Compensation Fund and Program
- C. 101 KAR 3:015, Leave Administrative Regulations for the
Unclassified Service

One important amendment to 101 KAR 2:140 was to change the term “sick leave” to “accumulated leave” and to incorporate the forms.

Ms. Bevington asked for the Board’s vote on these amendments. Mr. Sipek stated that there was one clerical error 101 KAR 2:140, p. 3, a reference to “sick” leave. Ms. Bevington stated it should be “accumulated” leave. Chairman Sapp requested that change be made and asked if there were any other questions to the proposed regulations.

Mr. Hutcheson moved to accept the amendments to the above regulations. Dr. Stevens seconded and the motion carried 7-0.

Ms. Bevington also provided the Board with proposed amendments to the Employee Performance Evaluation System, 101 KAR 2:180, with the attached form. Ms. Bevington stated she will need the Board’s approval at the December Board meeting, so that the agencies can begin using the new forms in January 2012. Chairman Sapp said that the Board members need time to review the amendments and proposed a vote at the December meeting. Ms. Bevington stated that the Director of the Division of Employee Management is available to answer any questions, but she will also be available at the December meeting.

Dr. Stevens asked about an employee being resigned after one year of sick leave. Ms. Bevington stated sick leave is separate from Worker’s Compensation and that a resigned employee has the option of returning to work. Dr. Steven’s stated that the physician’s goal is to get a patient back to work. Ms. Bevington stated that in the private sector, employees do not have the option of a one-year sick leave. Before an employee is resigned, the Personnel Cabinet asks the agencies to investigate and, if possible, place an employee in a position prior to resigning them out. Ms. Bevington stated that she would provide more information at the December meeting.

Upon conclusion of the Personnel Cabinet’s report, Chairman Sapp called the parties forward for oral argument.

5. ORAL ARGUMENTS

A. Valerie Januski v. Transportation Cabinet

Present for oral argument were Appellant, Valerie Januski; counsel for Appellant, Hon. Stephen Huddleston; and counsel for Appellee, the Hon. Ed Logan. After presenting oral arguments, the parties answered questions from the Board.

B. Maurice Spaulding & Rateisha Johnson v. Cabinet for Health and Family Services

Present for oral argument were the Appellants, Maurice Spaulding and Rateisha Johnson, and counsel for Appellee, the Hon. Muriel Varhely. After presenting oral arguments, the parties answered questions from the Board.

6. INVESTIGATIONS

Anonymous Request for Investigation of Department of Agriculture

Prior to discussing the request for investigation, Mr. Gillis advised the Board that he will recuse himself from participating in any discussion of this matter.

Mr. Sipek stated that this investigation was deferred due to a pending appeal, Rebecca Wheat v. Department of Agriculture, which was resolved by settlement. That settlement was approved by the Board at its October 2011 meeting. Therefore, the request for investigation is back on the agenda to determine whether this matter should be investigated.

Mr. Sipek stated that he sent notice to the Department of Agriculture that the request for investigation was on the Agenda for the November Board meeting. The Hon. Nicole Liberto and Ms. Danita Fentress-Laird were present to answer any questions. Mr. Sipek stated he also notified the “Anonymous” petitioner via e-mail; however, he has not received a response.

Chairman Sapp asked for a summary of the request for investigation and the appeal. Mr. Sipek stated that the allegations are that a non-merit employee was given special consideration when applying for a merit position within the Department. An appeal was filed by one of the applicants, Ms. Rebecca Wheat. A desk audit will be performed to determine whether it was appropriate to reclassify her. The parties reached a settlement agreement to await the findings of the desk audit, which was approved by the

Board, and is currently being processed by the Personnel Cabinet. Ms. Fentress-Laird stated that she and Mr. Lambert will keep in contact with Ms. Wheat.

Mr. Blevins stated that the gist of the request for investigation was that a non-merit employee was placed in a merit position, also known as "burrowing." Mr. Sipek stated although that is one way to state it, the allegation was that the non-merit employee was given special training to qualify her for the merit position and she did succeed in getting the position.

Ms. Gardner asked how many veterans applied for the position. Mr. Sipek stated that that issue was not addressed in the request for investigation. Ms. Gardner thought that information would have been brought out through Ms. Wheat's appeal, but it did not get that far. Ms. Fentress-Laird stated that five (5) veterans were interviewed. Seven (7) veterans were offered an interview, but two declined. Mr. Sipek asked if merit employees were interviewed. Ms. Fentress-Laird stated that three classified employees in the Department applied for the position, but only one was interviewed. Two candidates were internal mobility.

Mr. Blevins asked who would do the investigation, because there is still doubt whether the Department followed proper procedure. Mr. Sipek stated that either himself or Mr. Crocker. Mr. Crocker stated that the anonymous request for investigation could be deferred until Ms. Wheat's desk audit was completed. Mr. Blevins stated that the desk audit would not reveal whether the Department followed proper procedure.

Mr. Hutcheson asked whether it would be feasible to consolidate the anonymous request with Mr. Gillis' request for investigation. Mr. Sipek stated that a response to Mr. Gillis' request for investigation will be ready by the December Board meeting. However, if it were consolidated with the anonymous request for investigation, it would delay the report.

Mr. Blevins made a motion to defer the anonymous request for investigation to the December 2011 Board meeting. Mr. Hutcheson seconded and the motion carried 6-0, with Mr. Gillis recusing.

7. CLOSED SESSION

Mr. Gillis moved that the Board go into Executive Session for the purposes of discussing complaints, proposed or pending litigation, and deliberations regarding individual adjudications. Ms. Gardner seconded. Chairman Sapp stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. Pursuant to KRS 61.810(1) (c), (f), and (j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; and deliberations regarding individual adjudication. The motion carried 7-0. (10:50 a.m.)

Mr. Hutcheson moved to return to open session. Ms. Gardner seconded and the motion carried 7-0. (11:57 a.m.)

8. CASES TO BE DECIDED

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments where applicable.

A. Valerie Januski v. Transportation Cabinet

Dr. Stevens moved to note Appellant's exceptions, Appellee's response and to defer this matter to the next meeting of the Board. Mr. Hutcheson seconded and the motion carried 7-0.

B. Maurice Spaulding and Rateisha Johnson v. Cabinet for Health and Family

Mr. Hutcheson moved to note Appellant Johnson's exceptions, Appellee's exceptions for Appellant Spaulding, and Appellee's response to Appellant Johnson's exceptions (returned as untimely and not considered), and to defer this matter to the next meeting of the Board. Judge Chandler seconded and the motion carried 7-0.

C. Mickey Craig v. Tourism, Arts & Heritage Cabinet (Parks)

Mr. Gillis moved to note Appellant's exceptions, Appellee's response and to accept the recommended order dismissing the appeal. Mr. Hutcheson seconded and the motion carried 7-0.

D. Joseph Proctor v. Justice and Public Safety Cabinet (Corrections) – (2 appeals)

Mr. Hutcheson moved to note Appellant's exceptions, Appellee's response and to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 7-0.

E. Stephen Pulliam v. Public Protection Cabinet

Mr. Gillis moved to note Appellant's exceptions and to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 6-0, with Ms. Gardner recusing.

Show Cause Orders – Appeals Dismissed –Response Filed

The following cases had a show cause order entered by the hearing officer recommending that the appeals be dismissed for failure to timely prosecute unless a statement was filed by the Appellants stating sufficient cause to excuse their failure to appear at the scheduled hearing. The Appellants filed responses to the show cause orders.

F. Lorenza Abrams II v. Justice and Public Safety (Corrections)
--Appellant's Response

Mr. Chandler moved to return this matter to the active docket. Ms. Gardner seconded and the motion carried 7-0.

G. Vickie Bush v. Justice and Public Safety Cabinet (Corrections)
--Appellant's Response
--Appellee's Response returned as untimely

Mr. Hutcheson moved to return this matter to the active docket. Dr. Stevens seconded and the motion carried 7-0.

Show Cause Orders – Appeals Dismissed – No Response Filed

The following cases had a show cause order entered by the hearing officer recommending that the appeals be dismissed for failure to timely prosecute unless a statement was filed by the Appellants stating sufficient cause to excuse their failure to appear at the scheduled hearing. There was no response submitted by the Appellants to the show cause orders.

- H. Brandon Brown v. Cabinet for Health and Family Services
- I. Gregory Smith v. Cabinet for Health and Family Services
- J. Jeremy R. Turner v. Justice and Public Safety Cabinet (Corrections)

Ms. Gardner moved to find that the Appellants had not responded to the show cause order and that the recommended orders be accepted dismissing the appeals for failure to timely prosecute the appeals. Dr. Stevens seconded and the motion carried 7-0.

9. WITHDRAWALS

Dr. Stevens moved to consider the following withdrawals of appeals *en bloc* and to accept the withdrawals and dismiss the appeals. Mr. Chandler seconded and the motion carried 7-0.

- A. Deborah M. Howell v. Energy and Environment Cabinet
- B. Bettina Conard v. Justice and Public Safety Cabinet (DJJ)
- C. Joe Martin v. Transportation Cabinet
- D. Malory Riley v. Justice and Public Safety Cabinet (Corrections)
- E. Ted Schlenker v. Justice and Public Safety Cabinet (Corrections)
- F. Chad Fox v. Justice and Public Safety Cabinet (Corrections)
- G. Kirk McKee v. Transportation Cabinet

10. SETTLEMENTS

Mr. Blevins moved to accept the following settlements *en bloc* and to accept the settlements as submitted by the parties; sustaining the appeal to the extent set forth in the settlement. Ms. Gardner seconded and the motion carried 7-0.

- A. Joshua Bryant v. Department of Military Affairs
- B. Donna Knight v. Cabinet for Health and Family Services
- C. Wesley Marsh v. Transportation Cabinet (2 appeals)
- D. Mattie McGowan v. Cabinet for Health and Family Services (mediated)
- E. Terry Morgan v. Justice and Public Safety Cabinet
- F. Jose Rodriguez v. Transportation Cabinet
- G. Dawn Wilkerson v. Justice and Public Safety Cabinet (DJJ)
- H. Joann Mattox v. Tourism, Arts and Heritage Cabinet (Fish and Wildlife)
(2 appeals))
- I. William D. Pollard v. Cabinet for Health and Family Services

11. OTHER

Chairman Sapp proposed returning to the items for discussion that were deferred earlier under the Executive Director's report as follows:

B. 2012-2014 Budget Request Proposal

Mr. Sipek stated the proposed budget was a continuation of the current budget with exceptions. Mr. Sipek stated that there were two additional requests:

- 1. Restore funds carried over from a previous year that were taken; and
- 2. Funds for Employee Election for Two Merit Employee Board Members.

The proposed budget request has been submitted to the office of the State Budget Director.

Mr. Gillis asked about employees' annual increments. Mr. Sipek stated that in the past when there was a large surplus of funds the Board offered a suggestion, but not routinely. Mr. Gillis stated that 1 percent or 0 percent demoralizes employees, which can be seen in the appeals. Mr. Sipek stated that according to the statute, the Board has budgeted for increments. Ms. Morris stated that increments are a part of the budget's "defined calculations." She added that the two requests Mr. Sipek spoke about (restore

money and employee election) are additional budget requests above defined calculations.

Ms. Morris stated that monies assigned to hearing officers may run out by April 2012 if the request to restore money is denied. However, Mr. Crocker stated that either he or Mr. Sipek can take over some of the evidentiary hearings, but it would be impossible to keep up the pace very long with their daily job tasks.

Mr. Blevins stated that it would be in everybody's interest to reduce the amount of time it takes to complete the appeal process. Mr. Crocker stated that the problem is scheduling delays with either the agency attorney or the Appellant's attorney. Chairman Sapp stated that the length of the appeal process is not the problem, as there is always a hearing officer available.

Chairman Sapp advised staff to keep an eye on the current fiscal year budget, and if the Board is running out of money for the hearing officers or there is a budget crisis, to let the Board members know at the February or March 2012 Board meeting. The Board can then decide what their options are and try to do something about it.

Mr. Sipek stated, to follow-up on Mr. Blevins' concerns, that appeals involving dismissals are given first priority due to back pay issues. However, some appeals do not involve large sums of money (suspensions) or no money at all. Cases sit idle for reasons not due to the Personnel Board staff; the parties may request a continuance, or there are scheduling conflicts, and, in some instances, the parties are waiting for court actions to be disposed of before commencing with their appeal. Mr. Sipek stated that the Board prioritizes appeals and scheduling is a very difficult task. Mr. Sipek stated that he had heard some good suggestions and will do his best to carry them out.

Mr. Crocker advised that the Chairman of the Board has authority to request additional funds through the Budget Office; hearings and work load may be a reason for the request. Mr. Crocker stated that the last time there was a budget crisis for the Board was in 2004. Chairman Sapp stated that it is a balancing act to keep going, but there is a need to share the shortfall with the rest of state government. Mr. Blevins asked that an internal summary of the back pay be kept on cases. Mr. Crocker stated that the Board receives Payroll Vouchers from the agencies. Mr. Blevins further stated that he is not being critical of the Board's staff, just wants to find out how to move appeals along quickly.

Mr. Hutcheson moved to approve the 2012-2014 Proposed Budget. Dr. Stevens seconded and the motion carried 7-0.

C. Annual Report for 2011

Mr. Sipek stated that at the beginning of the fiscal year there were 238 pending appeals, 288 filed during the year and 310 final orders. The number of appeals is down; due to fewer appeals filed against the Personnel Cabinet (i.e. not getting on a register or being removed from a register). Many of the appeals against the Personnel Cabinet were eventually withdrawn, and although there is less work involved with withdrawals, it raised the number of appeals. The Board's work load remains the same even though the number of appeals is down. The appeals are more complex with multi-day hearings.

Another significant change is the number of settlements, 72. The Kentucky Employee Mediation Program (KEMP) has facilitated settling many appeals.

Mr. Sipek stated that a section marked "Grievances" has been added to the Annual Report. In 2010 the General Assembly amended KRS 18A.075(6) to include the number of grievances filed, which the Board has to request from the different agencies. Missing from the report is the number of merit employees at the beginning of the fiscal year, July 1, 2010, and the end of the fiscal year, June 30, 2011. The Board is waiting on this information from the Personnel Cabinet¹. Chairman Sapp asked if this was a lingering request. Mr. Crocker stated it was and that Mr. Sipek is going before the State Government Committee on Wednesday (November 16, 2011) and will need a complete report.

Mr. Gillis asked about grievances, and if the Board was going to follow up about the five day response time.

Chairman Sapp stated that he heard the number of state employees has decreased by about 5,000. Chairman Sapp advised that he wants a full annual report and is going to make an effort to get that information today.

Mr. Hutcheson moved to approve and to issue the report once it is completed. Dr. Stevens seconded and the motion carried 7-0.

¹The Personnel Board's Annual Report was submitted to the Governor, the General Assembly and the Personnel Cabinet in full compliance with KRS 18A.075(6).

In closing, the Board members were reminded that the February Board meeting was scheduled for the third Friday, February 17, 2012. The Board members were also reminded that the next meeting was on Friday, December 9, 2011.

There being no further business, Mr. Hutcheson moved to adjourn. Dr. Stevens seconded and the motion carried 7-0. (12:35 p.m.)

Wayne D. Sapp, Chairman

Larry B. Gillis, Vice Chairman

David B. Stevens, Member

David F. Hutcheson, Jr., Member

Susan Gardner, Member

Tommy Chandler, Member

Donald W. Blevins, Member